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**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA**

TODD BRINKMEYER

Petitioner,

vs.

WASHINGTON STATE LIQUOR AND
CANNABIS BOARD,

Respondent.

NO. 3:20-cv-05661-BHS

[PROPOSED] ORDER DENYING
MOTION FOR PRELIMINARY
INJUNCTION

THIS MATTER is before the Court on Petitioner's Motion for Preliminary Injunction (Motion). The Court has considered the Motion, the Declarations of Todd Brinkmeyer, Scott Atkison, Chris Masse, and Andy Murphy in Support of Motion, the Response to Motion, and the Declaration of Rebecca Smith in Support of Response to the Motion, and any Reply filed in Support of Petitioner's Motion, the files and records herein, and the Court is fully advised in the matter. After careful consideration the Court is persuaded that Petitioner's Motion must be **DENIED.**

I. DISCUSSION

In 2012, voters in the state of Washington passed Initiative Measure 502 (I-502), decriminalizing marijuana. I-502 is primarily codified in Chapter 69.50 RCW. Statutory requirements for licensure included a 3-month residency at the time of application.

1 RCW 69.50.331. This requirement was later amended in 2015 to a 6-month requirement.
 2 As pertinent here, it is undisputed that the statutory requirement applies to all members of
 3 Limited Liability Companies (LLCs) who are marijuana businesses.

4 Petitioner, an Idaho resident, where marijuana is illegal under state and federal law, has
 5 previously been vetted as a financier for marijuana businesses in Washington, but is interested
 6 in assuming ownership of several marijuana retail businesses. Based on the residency
 7 requirements, Petitioner is unlikely to qualify for licensure.

8 Petitioner claims that the residency requirements contained in RCW 69.50.331 and
 9 associated rules are unconstitutional. Petitioner and Respondent disagree. Respondent argues
 10 that residency requirements are essential to public safety and law enforcement interests, as well
 11 as to maintain Washington's unique tiered marijuana system. In particular, Respondent relies
 12 upon its Licensing Director Rebecca Smith who lays out the following reasons for the
 13 residency requirement (Justifications):

- 14 a. Marijuana is federally illegal under the CSA. Since I-502 passed, Washington has
 15 followed the guidance of the *Cole* Memo, which laid out several enforcement
 16 priorities for states to follow if they legalized marijuana. Smith Decl. ¶ 4. Those
 17 priorities include preventing diversion of marijuana out of state and other criminal
 18 activity. Ex. 8. The *Cole* Memo further states that states should have a strong and
 19 effective regulatory system in order to protect public safety. *Id.* The residency
 20 requirement maintains the strong and effective regulatory system and effectuates
 21 the priorities of the *Cole* memorandum. *Id.*
- 22 b. The domicile of marijuana business owners in Washington ensures that a
 23 sufficient background check can occur. Smith Decl. ¶ 5. A background check of
 24 an owner includes the ability to access local databases, where misdemeanors that
 25 a federal background check would not pick up. *Id.* Knowing the character of a
 26 future marijuana owner is essential to know whether to license them or not. *Id.*

- 1 c. Local jurisdictions are also empowered to object and provide further insight into
2 any applicant in a Washington marijuana business. Smith Decl. ¶ 8. Domicile in
3 Washington gives the Board ability to contact local authorities and find out
4 additional information regarding any individual who wishes to enter the
5 precarious marijuana industry. *Id.*
- 6 d. Washington marijuana owners are held responsible for the conduct of their
7 business, both through regulatory and criminal prosecution. Smith Decl. ¶ 6. With
8 residency established in Washington, Enforcement can locate, interview, and,
9 ultimately hold accountable the individuals who choose to enter the marijuana
10 industry. Smith Decl. ¶ 7. Because Board Enforcement Officers have no
11 jurisdiction outside of Washington, it would impede their ability to conduct
12 investigations and file prosecutions. *Id.*
- 13 e. The Washington marijuana industry is a uniquely tiered system—an owner can
14 only be on the retailer or the producer/processor side. Smith Decl. ¶ 9. This is
15 modeled on the liquor regulatory system to prevent big marijuana from taking
16 over the industry, and the overall goal of preventing criminal enterprise. *Id.*
17 Washington also limits retailers to only five licenses total. Smith Decl. ¶ 10.
18 Given that no other state has this set up, elimination of the residency requirement
19 would jeopardize Washington’s unique system, as it would be difficult to
20 determine whether an out-of-state applicant already was involved in the
21 marijuana business. Smith Decl. ¶¶ 9-10.
- 22 f. Washington boasts a 70 percent rate of displacement of the illegal market by legal
23 marijuana, one of the higher percentages in the United States. Smith Decl. ¶ 14.
24 Given that overproduction and diversion are issues in other states where no
25 residency requirement exists, such as Oregon, there is a correlation of the integral
26 nature of the residency requirement. *Id.*

g. Washington’s residency requirement also protects and respects other states that have chosen not to legalize marijuana. Smith Decl. ¶ 15. A US attorney in a state that has taken a more conservative approach may decide to prosecute citizens that decide to take ownership interest in an out-of-state marijuana business. *Id.*

This matter is now before the Court on Petitioner’s Motion for Preliminary Injunction. Petitioner filed his motion in an attempt to have the residency requirement for Washington State marijuana licensure deemed facially unconstitutional. Respondent asserts that Petitioner does not meet any of the four elements necessary to issue a preliminary injunction.

To obtain a preliminary injunction, Petitioner has the burden to demonstrate that (1) they are likely to succeed on the merits; (2) they are likely to suffer irreparable harm in the absence of preliminary relief; (3) the balance of the equities tips in their favor; and (4) an injunction is in the public interest. *Winter v. Natural Res. Defense Council, Inc.*, 555 U.S. 7, 20. Alternatively, Petitioner may secure preliminary injunctive relief by raising “serious questions” going to the merits and showing that a balancing of the hardships “tips sharply” in the Petitioner’s favor. *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011). The Court finds that under either formulation, Petitioner has not met the four required factors to be entitled to preliminary injunction.

Specifically, the Court **FINDS** as follows:

A. Likelihood of Merits

First, the record indicates that there is not a likelihood of Petitioner’s success on the merits.

1. Article IV Privileges and Immunities. The Court concludes that Petitioner has no fundamental right under the Privileges and Immunities Clause of Article IV to be an owner of a marijuana retailer business. The Court further concludes that even if such right existed, Petitioner concludes that substantial reasons exist for treating residents differently from nonresidents, and the discrimination practiced bears a close relationship to the State’s objective. *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274, 284

(1985). In particular, Respondent through its Licensing Director Rebecca Smith provided numerous reasons for the residency requirement—the so-called “Justifications.” The Court finds the Justifications to be persuasive and provide numerous substantial reasons including, but not limited to, protecting Washington’s unique tiered system and marijuana regulatory system, ensuring owners who are responsible for the business to be domiciled here to be properly investigated, and following the enforcement priorities of the *Cole* memo. The Court concludes that all the Justifications supply the close relationship of maintaining Washington’s tightly regulated marijuana industry. This claim fails.

2. Dormant Commerce Clause (DCC). The Court concludes that Petitioner cannot assert a DCC challenge because the CSA is an exercise of Congress’ power that permits states to encumber marijuana activity as they see fit. *See Gonzales v. Raich*, 545 U.S. 1 (2005). Even if a DCC challenge could be asserted, the Court concludes that the residency requirement is “narrowly tailored to advance a legitimate local purpose.” *Tennessee Wine & Spirits Retailers Ass’n v. Thomas*, 139 S.Ct. 2449, 2461-62 (2019) (internal quotations omitted). The Court finds *Tennessee Wine* distinguishable and that the Justifications demonstrate the legitimate local purposes needed for domicile of owners. Furthermore, the Court finds that requiring six months of residency is narrowly tailored to advance those goals, for the reasons set forth by Director Smith’s Declaration at ¶ 12. This claim fails.

3. Fourteenth Amendment Equal Protection and Privileges or Immunities Clauses. The Court concludes that a rational basis standard of review should apply to Petitioner’s right to travel assertion. *See Mem’l Hosp. v. Maricopa Cty.*, 415 U.S. 250, 256–57 (1974). The Court further concludes that even if strict scrutiny would apply as described in *Saenz v. Roe*, 526 U.S. 489, 502-04, Petitioner’s challenge would still fail because Respondent has demonstrated substantial interests. *Martinez v. Bynum*, 461 U.S. 321 (1983). The

1 Court finds that the State has a substantial interest in having a residency requirement as
 2 set forth in the Justifications, including preserving Washington's unique tiered marijuana
 3 system separating retailers and producers/processors, ensuring the marijuana rules and
 4 regulations can be enforced by the Board Officers, preventing the criminal element from
 5 entering Washington's marijuana market, and following the *Cole* Memo. This claim fails.

6 **4. Fourteenth Amendment Due Process Clause.** It is undisputed by the parties that
 7 rational basis review applies to this challenge. *See, e.g., Martinez v. Goddard*, 521 F.
 8 Supp. 2d 1002, 1005-06 (D. Ariz. 2007). The Court concludes that the Justifications set
 9 forth legitimate reasons and are rationally related to the residency requirement. The Court
 10 finds *Gulch Gaming, Inc. v. State of S.D.*, 781 F. Supp. 621, (D.S.D. 1991)
 11 distinguishable because at issue was federally legal activity, gambling. In addition, other
 12 aspects of the Justifications were not at issue in that case. Finally, the Court finds
 13 additionally compelling that Board Enforcement officers can only enforce laws within
 14 Washington, whereas gambling officers can cross state lines. Smith Decl. ¶ 7. This claim
 15 fails.

16 **5. Washington's Privilege and Immunities Clause.** The Court concludes that Petitioner
 17 cannot assert a claim under Washington's Privileges and Immunities clause because it
 18 only protects Washington citizens—not out-of-state citizens. The Court further
 19 concludes that even if it did protect out-of-state citizens, Petitioner has not met his burden
 20 in showing a fundamental right is implicated. *See Grant County Fire Prot. Dist. No. 5 v.*
 21 *City of Moses Lake*, 150 Wn.2d 791, 811-14, 83 P.3d 419 (2004) (*Grant County II*).
 22 Washington has already determined there is no fundamental right in liquor businesses;
 23 the Court easily concludes that there cannot be a fundamental right in marijuana retailer
 24 or production, a federally illegal activity. *Randles v. Liquor Control Bd.*, 33 Wn.2d 688,
 25 694 (1949); *Jow Sin Quan v. Liquor Control Bd.*, 69 Wn.2d 373, 382 (1966). Even if
 26 there was such a right, the Court concludes that reasonable grounds exist, as laid out in

1 the persuasive Justifications, to support the residency requirement. *Ockletree v.*
 2 *Franciscan Health Sys.*, 179 Wn.2d 769, 776 (2014). This claim fails.

3 **6. Rule Challenge.** The Court finds that Petitioner lacks standing to challenge any
 4 “expansion” of the residency requirement in rule. Petitioner seeks to receive the right to
 5 be a member of a Limited Liability Company (LLC) that holds ownership interest in a
 6 marijuana retailer license. The Petitioner does not assert that the statutory residency
 7 requirement would not already apply to a member of an LLC. RCW 69.50.331(1)(b)(ii),
 8 (iii). Thus, the Petitioner lacks an “injury in fact” and is not aggrieved by the Board’s
 9 rules. *Allan v. Univ. of Wash.*, 140 Wn.2d 323, 327, 334 (2000). Even if Petitioner has
 10 standing, he only argues that the expansion of the residency requirement to shareholders
 11 and spouses in rule exceeded the Board’s rulemaking authority. *See* Dkt. #6 at 22. The
 12 Court concludes that the Legislative intent was to include a “shareholder” in the statute
 13 and any reference in rule to including “shareholder” is merely synonymous with the
 14 statute. The Court further concludes that it was within the Board’s power to promulgate
 15 rules to require spouses to meet the residency requirement. RCW 69.50.342(1);
 16 *Haines Marchel v. Wash. State Liquor & Cannabis Bd.*, 1 Wn. App. 2d 712, 716 (2017).
 17 This claim fails.

18 **B. Irreparable Harm**

19 The Court further finds that the Petitioner has not established irreparable harm. While
 20 the Petitioner and Mr. Atkison may be close friends, the turmoil to that relationship in not being
 21 able to transfer ownership interest in marijuana businesses does not rise to the level of irreparable
 22 harm. Intangible injuries can be deemed irreparable harm, but it does not rise to the level
 23 identified in *Rent-A-Ctr., Inc. v. Canyon Television & Appliance Rental, Inc.*, 944 F.2d 597, 603
 24 (9th Cir. 1991) that Petitioner relies upon. Furthermore, there is no evidence that the other
 25 members of the LLC marijuana retailers cannot supply the purported business acumen that is
 26 currently maintaining the businesses. The Court concludes that Petitioner’s comparison to

1 *Melendres v. Arpaio*, 695 F.3d 990 (9th Cir. 2012) is also distinguishable, as his level of harm
 2 does not rise to the level of a group of individuals being illegally detained at the border. The
 3 Petitioner fails to meet his burden in showing irreparable harm.

4 **C. Balance of Equities / Public Interest**

5 The Court can look at the balance of equities and public interest factors together. *League*
 6 *of Wilderness Defenders/Blue Mountains Biodiversity Project v. Connaughton*, 752 F.3d 755,
 7 766 (9th Cir. 2014). This Court “must balance the competing claims of injury and must consider
 8 the effects on each party of the granting or withholding of the requested relief.” *Winter*, 555 U.S.
 9 at 24.

10 The Petitioner asserts because he is already vetted as a financier, which is similar but not
 11 the same as an LLC member, that the equities are in his favor. The Court questions this assertion
 12 as Director Smith raises additional vetting that occurs for an LLC member. Smith Decl. ¶ 11.
 13 Moreover, the Court notes, though, that the Petitioner moved for a preliminary injunction based
 14 on a facial challenge and has asked this Court to deem the residency requirement inoperable for
 15 not just him, but anyone. Dkt. #6 at 8. Licensing Director Smith declared that elimination of the
 16 residency requirement would result in potentially hundreds of new applications for cannabis
 17 ownership due in part to the first buyer right in contracts. Smith Decl. ¶ 11. She also notes the
 18 difficulty of processing the applications due to the impact of the COVID-19 pandemic on the
 19 agency, including furloughs and telework. *Id.* Director Smith also declares that removing the
 20 residency requirement now and then reinstating later by this Court could result in an upset of the
 21 Washington marijuana industry. *Id.* The Court finds these reasons compelling and persuasive.

22 The Court finds that the equities are in Respondent’s favor, and denying the preliminary
 23 injunction favors the public interest. The impact on Washington’s marijuana industry outweighs
 24 Petitioner’s individual interest in receiving an ownership right in a cannabis business. The Court
 25 also finds that allowing more competition as noted by Petitioner in Washington’s marijuana
 26 business does not change the Court’s calculus. By denying the preliminary injunction, the Court

1 recognizes it is preserving a law that has been intact for eight years. The Court also concludes
 2 that marijuana is illegal in Idaho where Petitioner resides, and that this ruling better respects the
 3 individual decisions of states in determining legality of marijuana. Petitioner fails to show the
 4 equities are in its favor or that this would be in the public's interest.

5 II. CONCLUSION

6 For the above reasons, the Petitioner has failed to meet its burden to show any of the four
 7 factors to be entitled to a preliminary injunction.

8 ACCORDINGLY,

9 IT IS HEREBY ORDERED:

10 (1) Petitioner's Motion for Preliminary Injunction is DENIED (Dkt. # ____)

11 (2) The Clerk is directed to send copies of this Order to counsel for Petitioner, and
 12 counsel for Defendant.

13 Dated this _____ day of _____, 2020.

14
 15 BENJAMIN SETTLE
 16 UNITED STATES DISTRICT JUDGE

17 Presented by:

18 /s/ Joshua Orf-Rodriguez

19 JOSHUA ORF-RODRIGUEZ, WSBA No. 50101

20 HAYLEE P. MILLS, WSBA No. 48074

21 Assistant Attorneys General

22 1125 Washington St SE

23 Olympia, WA 98501

24 Phone: (360) 753-2702

25 Email: Joshua.OrfRodriguez@atg.wa.gov

26 Haylee.Mills@atg.wa.gov